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10 Attorneys for Defendant,  
 11 Damien Sexton

12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA

14	)	<b>Case No. CR-07-0742 (EDL)</b>
15	)	DEFENDANT SEXTON'S <i>EX PARTE</i>
16	)	APPLICATION FOR PRETRIAL ISSUANCE OF
17	)	RULE 17 SUBPOENA DUCES TECUM
18	Plaintiff,	[F.R.Crim.P. Rule 17(c) and Crim L.R. 47-3]
19	vs.	
20	DAMIEN SEXTON,	<b>Date: March 25, 2008</b>
21	Defendant.	<b>Time: 10:30 a.m.</b>
22		<b>Dept.: Judge Elizabeth D. Laporte</b>

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23 **INTRODUCTION**

24 Defendant Damien Sexton, by and through his counsel, and pursuant to the Due Process  
 25 Clause of the Fifth Amendment, the Compulsory Process Clause of the Sixth Amendment and  
 26 Federal Rule of Criminal Procedure 17(c), hereby makes this application for the issuance of a Rule  
 27 17 subpoena *duces tecum* for the documents set forth below which are both necessary and relevant  
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Defendant Sexton's *Ex Parte* Application for Pretrial Issuance of Rule 17 Subpoena *duces tecum*, Cr-07-0742 (EDL).

to the preparation of this case. The defendant makes this request *ex parte* because he is in need of the documents and information sought herein as quickly as possible in advance of trial, and the prosecution has already told the defense that they wont supply the items sought, nor believe that they legally as required to do so. Therefore, the following subpoena *duces tecum* is requested:

### United Airlines:

1. A flight manifest for United Airlines' Flight No. 189, for the date of March 21, 2007, which flight traveled from Philadelphia to San Francisco;
2. A seating chart showing the seat assigned to each passenger on the flight manifest; and
3. Contact information, consisting of the telephone numbers, and physical and/or P.O. Box addresses, and email addresses for each person aboard Flight No. 189, for the date of March 21, 2007.

This application is based on the instant application, the declaration of William L. Osterhoudt in support, and the legal authority set forth herein.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Defendant Damien Sexton is charged in a two count indictment with violating federal law relating to appropriate conduct of a passenger on a commercial aircraft. Count One alleges that on March 21, 2007, while abroad United Airlines Flight 189, traveling from Philadelphia to San Francisco, the defendant assaulted an individual, in violation of 49 U.S.C. Section 46506(1) and 18 U.S.C. Section 113(a)(4). Count Two likewise alleges that the defendant assaulted an individual, by threatening to inflict injury upon such person, in violation of 49 U.S.C. Section 46506(1) and 18 U.S.C. Section 113(a)(5).

The defendant was a passenger aboard this airplane, which traveled from Philadelphia to San Francisco. The first charge apparently emanates from a claim that the defendant stepped on, or otherwise came into contact with the passenger sitting on the aisle seat of his row, while attempting to exit his seat. The defense has not been made specifically aware of the alleged

1 conduct upon which Count Two is based, but assumes this allegation is based on a claim that the  
2 defendant, who was inebriated, yelled at either another passenger or a crew member, allegedly  
3 putting them in fear, during the course of this flight. It is clear that following the defendant's  
4 outburst, he was tackled in the aisle by several passengers, and placed in a seat, with his hands  
5 cuffed and his legs duct-taped together, after which time he sat quietly. The aircraft proceeded to  
6 its scheduled destination of San Francisco, where it was met by police officers.  
7

8       The government has given the defense reports (from both the police department and the  
9 FBI) of several interviews conducted with passengers and crew members after the flight landed in  
10 San Francisco. The interviewees, however, only comprise a small fraction of the passengers and  
11 crew aboard the aircraft – and do not even include all of the persons who were seated in the  
12 defendant's section of the aircraft. After reviewing the materials provided in discovery counsel for  
13 the defendant requested the flight manifest from the prosecution. In response, the Assistant United  
14 States Attorney stated that it did not possess this information. Accordingly, on March 11, 2008,  
15 defendant sought to obtain an Order from this Court requiring the government to obtain this  
16 information from United Airlines and disclose it to the defense. The government filed an  
17 Opposition to this request on March 18, 2008. Though the defendant strongly believes that the  
18 government is in the best position to obtain this data, which as explained below is both relevant  
19 and necessary to the defense, we seek the instant subpoena *duces tecum* in an effort to exhaust  
20 every possibility of obtaining the material independently.  
21  
22

## DISCUSSION

23       The defense is aware that Rule 17(c) subpoenas are not meant to provide a means for  
24 discovery. *United States v. Nixon*, 418 U.S. 683, 699-700 (1974); *United States v. Arditti*, 955 F.2d  
25 331, 345-346 (5th Cir. 1992). However, a pretrial subpoena *duces tecum* for the purpose of  
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1 reviewing documents in the hands of a witness (or his custodian) may be issued to protect a  
2 defendant's right to evidence that bears on guilt or punishment pursuant to the Sixth Amendment  
3 right to process. *See United States v. Tomison*, 969 F. Supp. 587, 593 (E.D.Cal. 1997).

4  
5 Rule 17(c) allows the trial judge to order pretrial production of such information in order  
6 to determine whether it should be turned over to the defendant. See *Nixon, supra.*, 418 U.S. at 698.  
7 The determination of whether a Rule 17(c) subpoena will issue is committed to the discretion of  
8 the trial court. *See Arditti, supra*, 955 F.2d at 345; *United States. v. Eden*, 659 F.2d 1376, 1381 (9th  
9 Cir. 1981). Rule 17(c) provides in pertinent part:

10  
11 For Production of Documentary Evidence and of Objects. . . . The court may  
12 direct that books, papers, documents or objects designated in the subpoena be  
13 produced before the court at a time prior to the trial or prior to the time when  
14 they are to be offered in evidence and may upon their production permit the  
books, papers, documents or objects or portions thereof to be inspected by the  
parties and their attorneys.

15 To obtain a subpoena under this Rule the moving party must show that (1) the documents  
16 are evidentiary and relevant; (2) they are not otherwise procurable reasonably in advance of the  
17 hearing by exercise of due diligence; (3) the party cannot properly prepare without such production  
18 and inspection in advance and that the failure to obtain such inspection may tend unreasonably to  
19 delay the trial; and (4) the application is made in good faith and is not intended as a general fishing  
20 expedition. *See Nixon*, 418 U.S. at 699-700.

21  
22 1. The Material Sought to Be Subpoenaed Herein Is Evidentiary and Relevant

23  
24 In this Application and subpoena *duces tecum* the defendant seeks the flight manifest and  
25 seating chart for United Airlines Flight No 189 (for the date March 21, 2007), as well as contact  
26 information for the persons aboard the flight. This information is unmistakably relevant and  
27 necessary in order for the defendant to fully prepare his defense. The prosecution in this case is  
28

1 built upon the internally contradictory and incomplete statements of a few witnesses to the events  
2 giving rise to this case. Because this was a relatively small craft, many more people would have  
3 witnessed and heard comments allegedly made (or yelled) by the defendant prior to being tackled  
4 by the group of male passengers then were interviewed by the authorities upon landing. Potential  
5 witnesses (particularly those seated in the defendant's row, and the rows in front of, behind and  
6 adjacent to it) would have directly witnessed, or even taken part in the circumstances leading up to  
7 and following this event. Many passengers certainly would have been in a position to see the  
8 group of approximately six men tackle the defendant on the floor of the craft, midway through the  
9 flight. Information from such witnesses is especially important in this case because, as described  
10 in defendant's motion for pretrial discovery, the interviews contained in discovery are  
11 contradictory in basic and crucial respects. Therefore, the passengers or crew members who have  
12 not yet been interviewed may be able to clear up mistakes and ambiguity in the accounts of those  
13 who have been interviewed.  
14

15       2.     This Material Is Not Otherwise Procurable Through the Exercise of Due Diligence

16       The information sought to be obtained under the Rule 17 subpoena consists of the Flight  
17 Manifest for Flight 189 for the date of March 21, 2007, a seating chart for this flight, and the  
18 contact information for the persons aboard this flight. There is no possibility of the defendant  
19 procuring this information, unless either the government obtains it from the Airline and then turns  
20 it over to the defense, or through the foregoing subpoena. Therefore, the requirement that the  
21 items not be procurable before the hearing through the exercise of due diligence, is satisfied here.  
22

23       3.     The Defendant Cannot Prepare His Defense Without This Production

24       The defendant is charged with assaulting two persons during the course of the flight  
25 between Philadelphia and San Francisco. Though there were undoubtedly many persons who  
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witnessed the events giving rise to these charges, the only individuals to be singled out and questioned by the authorities gave divergent accounts of what happened. The defendant cannot adequately prepare a defense, therefore, without being able to ascertain what other eyewitnesses observed. The defendant should not rightly be forced to proceed to trial based solely on the incomplete data collected by law enforcement, which was likely based on the Purser's view of who she would like interviewed, when other eyewitnesses are readily identifiable.

4. This Application Is Made In Good Faith

As the Court is aware, the defendant has attempted to obtain this crucial information from the government, first by way of an informal discovery request, and later in the form of a motion to this Court. In both instances, the government has averred that it cannot be compelled to provide information that it does not have in its possession. We make the instant request because the defense has an abiding need for the information in order to prepare a defense, and wants to make every effort to get the material in a timely manner. The defendant seeks by way of the instant application to obtain information which will allow him to investigate the eyewitnesses to the events surrounding the allegations against him. The request is straight forward and reasonable, and is made in a good faith effort to prepare to meet the charges at trial.

CONCLUSION

Based on the forgoing, it is respectfully submitted that the Court should authorize this Rule 17 subpoena directing United Airlines to produce the information requested. Any contact information of potential witnesses can be adequately protected by an Order of this Court.

Dated: March 19, 2007

Respectfully submitted,

/s/ William L. Osterhoudt  
WILLIAM L. OSTERHOUDT

1  
2                   **PROOF OF SERVICE**  
3

4                   I, the undersigned, declare as follows:

5                   I am employed in the City and County of San Francisco, State of California. I am over  
6 the age of eighteen (18) and am not a party to this action. My business address is 135 Belvedere  
7 Street, San Francisco, California 94117.

8                   On the date set forth below, I caused to be served the document entitled:

9                   **EX PARTE APPLICATION FOR PRETRIAL ISSUANCE OF RULE 17**  
10                   **SUBPOENA DUCES TECUM**

11                   on the party in this action as follows:

12                   Allison Marston Danner  
13                   Assistant United States Attorney  
14                   450 Golden Gate Avenue  
15                   San Francisco, CA 94102  
16                   allison.danner@usdoj.gov

17                   X [BY ELECTRONIC SERVICE] Utilizing the ECF system of the United States District  
18                   Court for the Northern District of California.

19                   I declare under penalty of perjury under the laws of the State of California that the  
20                   foregoing is true and correct.

21                   DATED: March 19, 2008

22                   /s/ Christopher W. Choy  
23                   Christopher W. Choy